Carroll & Carroll, Inc. *and* International Union of Operating Engineers, AFL–CIO Local 474. Case 10–CA–34076

December 31, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On July 15, 2003, Administrative Law Judge Pargen Robertson issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified and set forth in full below.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Carroll & Carroll, Inc., Savannah, Georgia, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified and set forth in full below.

1. Cease and desist from

(a) Threatening its employees with discharge because of its employees' activities on behalf of International Union of Operating Engineers, AFL–CIO Local 474, or any other labor organization.

(b) Threatening its employees with plant closure because of its employees' activities on behalf of a labor organization.

(c) Unlawfully interrogating its employees about their activities on behalf of a labor organization.

(d) Discharging and refusing to reemploy its employees because of its employees' activities on behalf of a labor organization.

(e) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Waldo Floyd full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Floyd whole for any loss of earnings and other benefits he suffered as a result of the unlawful discrimination against him, less any net interim earnings, plus interest.

(c) Within 14 from the date of this Order, remove from its files any reference to the unlawful discharge and within 3 days thereafter notify him in writing that this has been done and that the discharge will not be used against him in any way.

(d) Within 14 days after service by the Region, post at its facility or office in Savannah, Georgia, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notice to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In Member Liebman's view, the Respondent's exceptions are wholly inadequate to put at issue any of the factual findings on which the violations of law found by the judge were based.

[2] In adopting the judge's conclusion that the Respondent interrogated its employees in violation of Sec. 8(a)(1) of the Act, we note that the Respondent's attempt to poll its employees about their union sympathies did not comply with the procedural safeguards set forth in *Struksnes Construction Co.*, 165 NLRB 1062 (1967).

In adopting the judge's conclusion that the Respondent discharged Waldo Floyd in violation of Sec. 8(a)(3) of the Act, we find that the Respondent's proffered business justification for the discharge (declining work load) was pretextual. Since the justification was pretextual, we do not rely upon the judge's discussion of the Respondent's work records for the last quarter of 2002.

[3] We have modified the judge's recommended Order in accordance with our decisions in *Indian Hlls Care Center,* 321 NLRB 144 (1996), and *Excel Container,* 325 NLRB 17 (1997). We shall also issue a new notice to conform to the Order. As a remedial matter, we leave to compliance the issue of whether and when Floyd would have been laid off if he had not engaged in union activity.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

employees employed by the Respondent at any time since October 2002.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 31, 2003

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(seal) National Labor Relations Board

APPENDIX

NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO:

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten to discharge our employees because of their union activities on behalf of International Union of Operating Engineers, AFL–CIO Local 474 or any other labor organization.

WE WILL NOT threaten our employees with plant closure because of their protected and union activities.

WE WILL NOT unlawfully interrogate our employees because of their protected and union activities

WE WILL NOT discharge or fail to properly reinstate any of our employees because you engage in organizing activity on behalf of International Union of Operating Engineers, AFL–CIO Local 474 or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Waldo Floyd full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any rights or privileges previously enjoyed.

WE WILLmake Waldo Floyd whole for any loss of earnings and other benefits he suffered as a result of the unlawful discrimination against him, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Waldo Floyd and WE WILL, within 3 days thereafter, notify Floyd in writing that this has been done and that his discharge will not be used against him in any way.

CARROLL & CARROLL, INC.

Lauren Rich, Esq., for General Counsel.
Timothy G. Swinson, President, for the Respondent.
Ted Lawrence, Organizer, for the Charging Party.

DECISION

PARGEN ROBERTSON, Adminstrative Law Judge.A hearing was held in Savannah, Georgia, on May 21, 2003. I have considered the full record[1] as well as briefs filed by General Counsel and Respondent.

JURISDICTION

Respondent admitted that it is a Georgia corporation with an office and place of business in Savannah, Georgia. At material times it has engaged in the business of paving, grading and milling work as a contractor in the commercial construction industry. During the past 12 months in the conduct of those business operations Respondent operated more than one jobsite at the Georgia Ports Authority located in Savannah. Respondent admitted that it purchased and received at its Savannah jobsites goods, products and materials valued in excess of $50,000 during the past 12 months from other enterprises located in Georgia and that each of those enterprises received those goods directly from points outside Georgia. Respondent admitted that it provided services valued in excess of $50,000 in its Georgia business operations during the past 12 months for enterprises located in Georgia and that those enterprises annually ship goods valued in excess of $50,000 directly to points outside Georgia. In view of those admissions and the full record, I find

[1] I hereby receive in evidence a motion from General Counsel in the form of a June 13, 2003 letter from Lauren Rich. In that motion Counsel for General Counsel asserted that Respondent requested the replacement of GC Exh. 15, 16, 17 and 20. I grant that motion and receive "GC Exh. 15, Replaced," "GC Exh. 16, Replaced," "GC Exh. 17, Replaced" and "GC Exh. 20, Replaced." It is apparent that the original GC Exh. 15, 16, 17 and 20 should now be rejected. Therefore, I hereby direct that the original GC Exh. 15, 16, 17 and 20 are rejected.

that Respondent is and has been an employer at all time material within the meaning of Section 2(2), (6), and (7) of the National Labor Relations Act (Act).

LABOR ORGANIZATION

Union organizer Ted Lawrence testified regarding the status of the charging party. His testimony was not rebutted and it proved that the Charging Party was a labor organization at material times.

The Record Evidence in Support of the Complaint

It is alleged that Respondent engaged in unfair labor practices by threatening its employees with discharge and plant closure, because of their union activities; by interrogating its employees about the union; and by discharging Waldo Floyd because of his union activities.

BEFORE SEPTEMBER

Alleged discriminate Waldo Floyd was hired on July 10, 2002. He told Respondent he was a retired union operator.

SEPTEMBER

A number of employees signed Union authorization cards between September 10 and 20, 2002. Nicholas Evans signed a union authorization card on September 10 (GC Exh. 5). Waldo Floyd gave him the card. He signed it and returned it to Floyd. William Jonas signed a union authorization card (GC Exh. 3) on September 13. Waldo Floyd gave Jonas the authorization card. Jonas signed the card and returned it to Floyd. Jason Barnwell also signed a union authorization card on September 13 (GC Exh. 4). Barnwell was given the card by Waldo Floyd. He returned it to Floyd after signing the card. Waldo Floyd signed a union card on September 20 (GC Exh. 6). Floyd testified that he successfully solicited 11 employees to sign cards. He also talked to other employees about the Union. There were a total of 13 operators at that time. Floyd gave all the signed union cards to the Union.

OCTOBER

On an occasion when William Jonas was riding with his supervisor, Steve Motes, Motes told him "if Waldo Floyd didn't stop his union talk, he'd be hunting a job." That conversation occurred about 3 or 4 weeks after Jonas signed his card on September 13.

Jason Barnwell also talked with Motes about the Union. Around early October Motes told Barnwell that he had better leave the Union alone if he wanted his job. Motes said that Carroll & Carroll would never go union and they would close their doors first.

Respondent Management Officials Kenneth Pate and Timothy Swinson talked to several employees[2] including William Jonas, Nicholas Evans, and Jason Barnwell after Respondent received a demand letter from the Union. Those conversations occurred on October 28, 2002. Pate and Swinson[3] asked Jonas if he had heard anything about the Union and if Jonas had signed a union card.[4] They told him it would not be beneficial for him to join the Union. Jonas recalled that conversation occurred on the same day he found out Waldo Floyd had been discharged.

Pate and Swinson asked Jason Barnwell if he knew what he was doing to the Company after Barnwell replied that he had signed a union card. Pate told Barnwell that Carroll & Carroll would shut its doors before it will let that happen. Barnwell asked if they were planning on firing anyone for signing the union card. Pate replied that he could not answer that question at that point. Swinson asked if Barnwell knew what the Union did with their money and he told Barnwell that the Union bought whores.

Jonas testified that Steve Motes came to him shortly after the above conversation with Pate and Swinson. Motes asked several employees if anyone had signed a union card and a couple of the employees replied they had. Motes said that anyone that had signed a union card would be terminated. Additionally, when returning from lunch, Motes told Jonas that Waldo Floyd was "never one of us." Nicholas Evans testified that Motes talked with him on the same day but after he was asked by Pate and Swinson if he had signed a Union authorization card. Motes asked Evans if he had signed a card. When Evans replied that he had Motes said, "Ken was probably going to probably get you fired.

Waldo Floyd was fired on October 28.[5] That was the same day Respondent president Timothy Swinson and vice president Kenneth Pate asked several employees whether the employees had signed Union cards. Joseph Vail handed Floyd a envelop at quitting time and told Floyd they did not need him anymore. Floyd asked if he was laid off and Vail said he was for lack of work (GC Exh. 9).[6] Floyd testified that he did not read his separation document upon receipt from Vail but he testified that he never received written warnings for poor attitude or for improper operation of any equipment.[7]

Floyd recalled that before his layoff, he asked Pate about whether he had finished his probationary period and Pate replied that he had and that he had a job, that he was not going

[2] Pate and Swinson did not limit their questioning to employees that worked with Waldo Floyd. Instead according to Pate, they questioned approximately 52 employees on Respondent's jobs.

[3] Jonas testified that he believed Pate was the one that spoke but that it was either Pate or Swinson.

[4] The transcript incorrectly reflected that Jonas asked himself if he had signed a union card. The transcript is hereby corrected to properly reflect that Pate and Swinson asked Jonas if he signed a union card.

[5] Union organizer Lawrence testified that he submitted a demand letter to Respondent. Respondent received that demand letter through certified mail on October 28, 2002.

[6] Nicholas Evans talked with Steve Motes after Floyd was terminated. Motes asked what Waldo Floyd was doing still out in the parking lot. Evans replied they had probably laid Floyd off and Motes said that Floyd was never one of us.

[7] Floyd recalled talking to Steve Motes after he broke a pipe. Motes looked at the pipe and said that it was dead and not to worry about it. He broke another pipe in front of Joseph Vail and Timothy Swinson. They just smiled at him and told him to get back to digging. Jason Barnwell and Jonas testified about several occasions of employees breaking pipes. Barnwell broke a pipe. Nicholas Evans recalled that his brother Jason Evans had broken a pipeline. None of those employees were disciplined for their pipe breakage.

Floyd testified that Steve Motes and Joseph Vail complemented his work. Motes told Floyd that he had a good eye for grade.

anywhere, they had plenty work and were bidding on work. That conversation occurred on Tuesday the week before he was laid off. Joseph Vail asked Floyd what Pate had said about his probationary period. Floyd told Vail and then said the he did not see it, it looked to him like that job was coming to an end. Vail said the he knew where Floyd was going from there and that he was going to Mr. Carroll's pit in order to clean up the pit.

Both Jonas and Barnwell overheard Waldo Floyd ask Kenneth Pate if he had passed his probationary period. Jonas recalled hearing Pate reply that Floyd "didn't have anything to worry about, he had a job." Barnwell overheard Pate tell Floyd that he was planning on sending Floyd to the dirt pit.

Floyd returned to the job following his discharge and Respondent had Floyd escorted off the job. As Floyd was being escorted off the job, Jason Barnwell told Steve Motes that he thought they were pretty dirty for what they had done to Waldo. Motes said they did not need that kind around there.

NOVEMBER

After Floyd was discharged Steve Motes mentioned hiring Waldo Floyd back because they were short of help. Jonas asked Motes if they would really hire Floyd back and Motes answered no.

DECEMBER

Some time before Christmas Steve Motes also told Jonas that Mr. Carroll would shut the doors before he ever went union.

THE ALLEGED UNFAIR LABOR PRACTICES

(1) Section 8(a)(1) allegations

Threat of discharge

Steve Motes told William Jonas "if Waldo Floyd didn't stop his union talk, he'd be hunting a job." That conversation occurred in early October 2002. Also around early October Motes told Jason Barnwell that he had better leave the Union alone if he wanted his job.

After William Jonas was questioned by Kenneth Pate and Timothy Swinson on October 28 Steve Motes asked several employees including Jonas, if anyone had signed a union card and a couple of the employees replied they had. Motes said that anyone that had signed a union card would be terminated. On October 29 Motes asked Nicholas Evans if he had signed a card. When Evans replied that he had Motes said, "Ken was probably going to probably get you fired.

Motes denied that he threatened employees because of the Union.

(2) Threat of Plant Closure

As shown above, around early October Steve Motes told Jason Barnwell that he had better leave the Union alone if he wanted his job. Motes said that Carroll & Carroll would never go union and they would close their doors first.

Before Christmas 2002 Motes told William Jonas that Mr. Carroll would shut the doors before he ever went union.

Steve Motes denied that he threatened employees with plant closure it they selected the union. Motes testified that the only statements he made to employees about the Union was to the effect that he would not join the union because his father was in the union and he has no benefits at all from the Union.

As shown herein, Kenneth Pate and Timothy Swinson told Jason Barnwell that Carroll & Carroll would shut its doors before it let the Union in.

(3) Interrogation

Kenneth Pate and Timothy Swinson talked to approximately 52 employees about the Union on October 28, 2002. Pate and Swinson[8] asked William Jonas if he had heard anything about the Union and if Jonas had signed a Union card[9] and they told him it would not be beneficial for him to join the Union. Pate and Swinson asked Jason Barnwell if he knew what he was doing to the Company after Barnwell replied that he had signed a Union card. Pate told Barnwell that Carroll & Carroll would shut its doors before it will let that happen. Barnwell asked it they were planning on firing anyone for signing the Union card. Pate replied that he could not answer that question at that point. Swinson asked if Barnwell knew what the Union did with their money and he told Barnwell that the Union bought whores.

As shown Steve Motes questioned several employees as to whether they had signed Union cards. A couple of the employees replied they had. Motes questioned those employees after Pates and Swinson's interrogation of employees on October 28. Motes said that anyone that had signed a union card would be terminated. Nicholas Evans testified that Motes asked Evans if he had signed a card. When Evans replied that he had Motes said, "Ken was probably going to probably get you fired.

Findings

Credibility

As shown above there are several conflicts in testimony and the full record. In determining credibility I have considered the full record and the demeanor of the witnesses.

Respondent argued this is simply a matter on one party saying one thing and the other party another thing. However, that was not the case. As to several of the alleged unlawful comments there was no dispute in testimony. As to others it was apparent that several witnesses recalled similar statements by one particular supervisor.

I do not credit the testimony of Steve Motes or Kenneth Pate to the extent their testimony conflicted with other testimony. Several employees including William Jonas, Jason Barnwell and Nicholas Evans testified in direct conflict with the testimony of Steve Motes. Jonas, Barnwell and Evans had similar recollections of things said by Motes. However, their testimony was not so similar as to create suspicion. Motes, on the other hand, denied all their testimony as to conversations those employees had with him. The testimony of Jonas, Barnwell and Evans showed that Motes questioned employees about the Union and he threatened discharges and plant closure because of the Union. I credit that testimony.

[8] Jonas testified that he believed Pate was the one that spoke but that it was either Pate or Swinson.

[9] The transcript incorrectly reflected that Jonas asked himself if he had signed a union card. The transcript is hereby corrected to properly reflect that Pate and Swinson asked Jonas if he signed a union card.

Kenneth Pate was unable to recall if he asked any employees if those employees had signed Union cards but Pate admitted that he questioned employees to determine if the Union had a majority. Pate's testimony conflicted with that of several other employees including Waldo Floyd, William Jonas and Jason Barnwell. I credit Floyd, Jonas and Barnwell.

Conclusions

Section 8(a)(1) of the Act specifies it is an unfair labor practice for an employer to restrain or coerce employees in the exercise of protected rights. The Board and Courts have long held that threats including especially threats of discharge and plant closure constitute actions that are protected by Section 8(a)(1). The credited testimony of William Jonas shows that Steve Motes threatened to discharge employee Waldo Floyd when he told Jonas that Floyd would be hunting a job if he did not stop his union talk. The testimony of Jason Barnwell proved that Motes threatened him with discharge if he did not leave the Union alone. On October 28 Motes threatened several employees that anyone that signed a Union card would be terminated. On October 29 Motes threatened Nicholas Evans that he would get fired because he had signed a union card.

The credited testimony of Jason Barnwell and William Jonas proved that Pate, Swinson and Motes threatened employees that the plant would be closed before the Union was allowed in.

Those comments clearly constitute restraint and coercion within the scope of Section 8(a)(1) and are unfair labor practices.

The testimony of William Jonas, Nichols Evans, Jason Barnwell and Kenneth Pate proved that Pate and Swinson questioned employees on October 28. Jonas, Barnwell and Evans credibly testified that those questions concerned whether those employees had signed union authorization cards and whether they had heard anything about the Union. Pate and Swinson told employees that it would not be beneficial for employees to join the Union. Pate and Swinson questioned employees as to whether they knew what they were doing to the Company by signing a union card, and they threatened employees that Carroll & Carroll would shut its doors before it let the employees select the Union. They stated to employees they did not know whether they were planning to fire any employee for signing a union card and Swinson told employees that the Union used its money to buy whores.

In regard to whether interrogation constitutes an unfair labor practice, the Board recently considered that question in *Westwood Health Care Center*, 330 NLRB 935, 939, 940 (2000):

> We agree with our dissenting colleague that the applicable test for determining whether the questioning of an employee constitutes an unlawful interrogation is the totality-of-the-circumstances test adopted by the Board in *Rossmore House,* 269 NLRB 1176 (1984), affd. sub nom. *Hotel Employees Union Local 11 v. NLRB,* 760 F.2d 1006 (9th Cir. 1985), and adhered to by the Board for the past 15 years. [FN16] We also agree that in analyzing alleged interrogations under the *Rossmore House* test, it is appropriate to consider what have come to be known as "the Bourne factors," so named because they were first set out in.*Bourne v. NLRB,* 332 F.2d 47, 48 (2d Cir. 1964). Those factors are: (1) The background, i.e. is there a history of employer hostility and discrimination?
> (2) The nature of the information sought, e.g., did the interrogator appear to be seeking information on which to base taking action against individual employees?
> (3) The identity of the questioner, i.e. how high was he in the company hierarchy?
> (4) Place and method of interrogation, e.g. was employee called from work to the boss's office? Was there an atmosphere of unnatural formality?
> (5)Truthfulness of the reply.
> Unlike our colleague, however, we note that these and other relevant factors "are not to be mechanically applied in each case." 269 NLRB at 1178 fn. 20. As the D.C. Circuit Court of Appeals has similarly noted, determining whether employee questioning violates the Act does not require "strict evaluation of each factor; instead, '[t]he flexibility and deliberately broad focus of this test make clear that the Bourne criteria are not prerequisites to a finding of coercive questioning, but rather useful indicia that serve as a starting point for assessing the 'totality of the circumstances.'" *Perdue Farms, Inc. v. NLRB,* 144 F.3d 830, 835 (D.C. Cir. 1998), ***940** quoting *Timsco, Inc. v. NLRB,* 819 F.2d 1173, 1178 (D.C. Cir. 1987). In the final analysis, our task is to determine whether under all the circumstances the questioning at issue would reasonably tend to coerce the employee at whom it is directed so that he or she would feel restrained from exercising rights protected by Section 7 of the Act.

Here, not all the Bourne criteria are applicable. For example, this was the first occasion for a Union to seek to represent Respondent's employees and there was no prior history regarding antiunion campaigns. Nevertheless, there was a history of employer hostility expressed through the comments found above to be unlawful.

As to the nature of the information sought, the evidence showed that Pate and Swinson went beyond inquiry of whether the Union represented a majority of "all heavy equipment operators and mechanics," as requested in the Union's demand for recognition (GC Exh. 10). As shown above Pate and Swinson interviewed all Respondent's employees without regard to their classification. Moreover, their questions to those employees that testified included whether the employee had signed a Union card and whether the employees had heard anything about the Union. They told the employees it would not be beneficial for them to join the Union. Pate and Swinson questioned the employees as to whether they knew what they were doing to the Company by signing a Union card and they threatened to shut the doors before the employees would be allowed to select the Union. When questioned as to whether they would discharge employees because of the Union they replied they did not know.

As to the identity of the questioners, all three were supervisors. Moreover, Timothy Swinson is Respondent's president and Kenneth Pate is its vice-president. As to place, evidently the questioning occurred on the job and the record is not complete as to the truthfulness of the employees' replies.

Additionally, in consideration of the totality of the circumstances, the questioning took place in an atmosphere of threats of discharge and plant closure.

Respondent argued that Swinson and Pate acted out of ignorance and that their main focus was to disprove that the Union represented a majority. I find that argument is not convincing. In the first place Swinson and Pate did not limit their inquiries to whether the Union represented its operators and mechanics. As shown above there were 13 employees in the unit sought by the Union. However, Swinson and Pate questioned approximately 52 employees on its several jobs.

Secondly, Swinson and Pate did not limit their questions to those relevant to whether the employees were represented by the Union. As shown above, their questions were far more invasive. I am convinced that the questioning by Pate and Swinson constitutes unlawful interrogation.

Section 8(a)(3) allegation

The Discharge of Waldo Floyd

Waldo Floyd was fired on October 28.[10] That was the same day Respondent received a demand for recognition from the Union, and the same day that Kenneth Pate and Timothy Swinson unlawfully interrogated 52 of Respondent's employees about the Union.

As shown above, about 3 or 4 weeks after he signed a card on September 13, William Jonas talked with his supervisor, Steve Motes. Motes told Jonas that Floyd would be hunting a job if he didn't stop his Union talk.

Floyd was hired on July 10, 2002. During his interview he told Joseph Vail and Steve Motes that he was a retired union operator from Ft. Washington, Pennsylvania. Vail watched Floyd operate machinery before hiring him. Among other things Vail commented that Floyd was slow on the motor grader. Nevertheless, Floyd was hired. While he worked there Steve Motes and Joseph Vail complemented Floyd's work. Motes told Floyd that he had a good eye for grade and Vail said that Floyd was his most dependable operator.

Waldo Floyd, William Jonas and Jason Barnwell all testified about Floyd talking with Kenneth Pate during the week before Floyd's termination. Floyd asked Pate if he had passed his probationary period. Jonas recalled hearing Pate reply that Floyd "didn't have anything to worry about, he had a job." Barnwell overheard Pate tell Floyd that he was planning on sending Floyd to the dirt pit. Floyd recalled that Pate replied that Floyd had passed his probationary period; that he had a job; that he was not going anywhere, they had plenty work and were bidding on work.

Joseph Vail asked Floyd what Pate had said about his probationary period. Floyd told Vail what Pate had said but Floyd then said the he did not see it, it looked to him like that job was coming to an end. Vail said the he knew where Floyd was going from there and that he was going to Mr. Carroll's pit and clean up the pit.

Waldo Floyd signed a Union authorization card and he solicited other employees to sign authorization cards, during September 2002. He testified that he successfully solicited 11 employees to sign cards. There were a total of 13 operators at that time. Floyd gave all the signed union cards to the Union. Floyd talked to other employees about the Union.

Respondent received a demand for recognition letter from the Union at 2:16 pm on October 28, 2002. Immediately upon receipt of that letter President Swinson and Vice President Pate interrogated 52 employees about the Union. At about 5 p.m. that same day, Respondent terminated Waldo Floyd.

Findings

Credibility

Some of the evidence regarding Floyd's discharge was not disputed. For example Floyd, Jonas and Barnwell testified to the effect that Floyd had passed his probationary period and that would continue to work for Respondent. Pate testified but he did not deny that testimony. Moreover, Project Manager Vail did not deny that after hearing of the conversation between Pate and Floyd, he told Floyd that Floyd was going to work in Mr. Carroll's pit. Moreover, testimony that Respondent complemented Floyd's work was not disputed. That testimony showed that Steve Motes told Floyd he had a good eye for grade. Joseph Vail told Floyd that he was the only dependable operator they had on that job and that he was always there.

There were serious problems regarding credibility especially in regard to Respondent's selection of Floyd for layoff. The record shows that Floyd was told he was being laid off due to lack of work the week following conversations with both Pate and Vail to the effect that Floyd would not be laid off. At the time of his layoff Floyd was given a separation notice. That notice was in an envelope and was not read by Floyd until after he left the job. The notice stated that Floyd was laid off for lack of work and that he had been selected as the first employee laid off because, "employee was the first in the cuts due to attitude and careless operation of equipment around structures."

However, in its post hearing argument Respondent expanded on the reasons it allegedly selected Floyd. In its brief Respondent argued that Floyd was selected because of (1) poor workmanship; (2) bad attitude toward Carroll & Carroll; (3) disrespect for management personnel; and (4) tenure time with the grading crew.

The testimony by Respondent's witnesses regarding the decision to layoff Waldo Floyd, was confused. Project Manager Joseph Vail testified that Chris Davis, President Timothy Swinson, Vice President Kenneth Pate, Asphalt Plant Manager Vincent and Vail were usually involved in discussing downsizing. Those discussions occurred in meetings every Thursday at 2:00 o'clock beginning in August 2002.[11] Steve Motes was not present during those meetings. Vail[12] testified that "we" discussed

[10] Union organizer Lawrence testified that he submitted a demand letter to Respondent. Respondent received that demand letter through certified mail on October 28, 2002 (GC Exh. 10, 11).

[11] It is important to recall that Vail talked to Waldo Floyd on the Tuesday before the week in which Floyd was laid off. Vail told Floyd that he would not be laid off but would be sent to Mr. Carroll's dirt pit.

[12] Vail testified that Waldo Floyd was dependable and was not a careless operator.

in those management meetings "who was going to be the next person that we needed to down-size."[13]

Vice-President Kenneth Pate testified that he recalled discussions of a need for a layoff but not the selection of a specific employee for layoff. He testified that he recalled some discussion of Floyd carelessly operating equipment and discussions about Floyd's attitude. However, according to Pate, the actual selection of an employee for layoff was not made in meetings he attended. Instead he testified that decision was by the field operation. He identified the people that made the actual decision to layoff Waldo Floyd as Vail and Motes.

Steve Motes was asked who made the decision to let specific people go. Motes testified in direct opposition to the testimony of Kenneth Pate. Instead of testifying that decision was made by field operations, Mote testified that management made the decision as to which specific employees would be laid off.

In view of the above, I find the testimony of Pate, Vail and Motes is in conflict as to the actual decision to layoff Waldo Floyd. I find there was no credible evidence showing the actual decision making which resulted in Floyd's layoff. None of Respondent's witnesses testified to being present when the decision was made to terminate Waldo Floyd and none of those witnesses admitted to first hand knowledge of which official or officials actually made the decision to terminate Floyd.

In view of the full record and the demeanor of the witnesses I credit the testimony of Floyd, Jonas and Barnwell and do not credit the testimony of Pate, Vail and Motes.

Conclusions

The record showed that Waldo Floyd was visibly engaged in Union organizing activities among Respondent's employees at the Savannah docks job from September 2002 until his discharge. He talked to Respondent's employees about the Union and Floyd successfully solicited 11 of 13 employees to sign union authorization cards.

The record also showed that Respondent was aware of Floyd's union organizing activities, Respondent harbored Union animus and Respondent considered discharging Floyd because of his organizing activities. As shown above even though Waldo Floyd told Respondent that he was a retired Union member when he was hired on July 10, 2002, it was not until September that he started organizing for the Union. In early October Supervisor Steve Motes told employee William Jonas that Floyd would be looking for a job if he did not stop his Union talk. After Floyd's discharge, Steve Motes told William Jonas that Floyd was "never one of us."

Respondent demonstrated union animus by its actions including the section 8(a)(1) comments found herein.

The element of timing is also significant in questioning whether General Counsel proved that Respondent was motivated by Union animus in terminating Floyd. Floyd was terminated on the same day that Respondent received the Union's demand for recognition. Respondent received the Union's demand for recognition (GC Exh. 10) at 2:16 p.m. on October 28, 2002.

Immediately thereafter Respondent interrogated 52 employees about the union organizing activity and, at approximately 5 p.m. that same day, Respondent terminated Waldo Floyd.

In view of the record evidence I find that General Counsel proved that Respondent was motivated by union animus to terminate Waldo Floyd. I shall now consider whether Respondent would have terminated Floyd on October 28 in the absence of his union activities.

In that regard I shall examine the evidence in regard to Respondent's asserted reasons for terminating Waldo Floyd. Those reasons are set out in Floyd's separation notice (GC Exh. 9) as (1) (cutting) work force as project comes to end; and (2) this employee was the first in cuts due to attitude and careless operation of equipment around structures.[14]

Respondent offered evidence showing that Project 1 was completed in December 2002. It argued that, in accord with routine practice common in this industry, it started a layoff in anticipation of the completion of that job. Floyd's separation notice included a comment to the effect that Respondent started its reduction in force with the layoff of Waldo Floyd. However, as shown herein, during the week before his layoff, both Kenneth Pate and Joseph Vail told Floyd that he would not be laid off. Instead, Floyd was told that he would be transferred to Mr. Carroll's dirt pit.

After Floyd's layoff and before anyone else was laid off, the Union filed an unfair labor practice charge on November 4 alleging that Floyd was unlawfully laid off. That charge was served on Respondent on November 5. From that point forward Respondent was aware that the Union was alleging that Respondent treated Floyd in a disparate, unlawful manner and that it may have to show that charge was untrue. It was with that knowledge that Respondent laid off two other employees before the end of the year.

With those matters and the full record, in mind, I have examined the background of Respondent's alleged motivation to layoff Floyd on October 28:

[13] Vail was asked on a number of occasions to identify the persons in the management meetings that stated Waldo Floyd was being selected for layoff because he had made some negative comments about the company. Vail evaded those questions and never gave an answer.

[14] Even though Floyd's separation notice showed the alleged reasons for his selection, Respondent subsequently offered additional reasons for the layoff. Respondent argued that Floyd was actually terminated because he was the best candidate for lay off due to lack of work and because of his: (1) Poor Workmanship; (2) Bad Attitude towards Carroll & Carroll, Inc.; (3) Disrespect for management personnel; and (4) Tenure time with the grading crew. The Board has found that changes in reasons for an employer's actions, tends to illustrate pretext. Moreover, as to poor workmanship, Floyd never received disciplinary action and Respondent knew that he was slow on the motor grader from before the time of his hiring. As to attitude, Floyd was never disciplined and he was complemented as being the most dependable employee. As to disrespect there was no showing of complaints by Respondent and there was no disciplinary action taken against Floyd. As to tenure, Respondent's records show that William Jonas was actually hired by Respondent after it hired Floyd. Jonas worked with Respondent but while employed by a temporary agency since June 19, 2002 but Respondent did not hire Jonas until September 19, 2002. Floyd was hired on July 10, 2002. Additionally, Respondent actually hired one employee as a laborer/operator in milling at the Phase 1 job after Floyd was terminated. Tracy Mydell was hired on November 19, 2002.

Cutting Work Force as Project Comes to End

As shown above the primary reason given for a layoff of any type on Floyd's separation notice was cutting "work force as project comes to end." However, there was little evidence that Respondent actually cut its work force before October 28. In that regard there was testimony as shown above, that discussions occurred regarding a reduction in force beginning in August or September 2002.

With the exception of Assistant Project Manager Randy Myers,[15] there was no evidence that Respondent actually started a layoff from the Project 1 job before October 28. As shown above, Respondent stated on Waldo Floyd's separation notice that he was the first layoff.

The evidence regarding the August to October management discussions and the conversations between Waldo Floyd and Kenneth Pate and then between Waldo Floyd and Joseph Vail the week before Floyd's termination, present significant issues.

Project Manager Joseph Vail testified that Respondent held weekly management meetings every Thursday at 2 p.m. management started discussing downsizing off the Phase 1 job, "around August, the end of August, first of September" according to Vail.

That evidence must be considered in the light of credited testimony regarding Floyd's conversations with first Pate, then Vail, in the week before his termination. Both Pate, then Vail, told Floyd he would continue to have a job.

By examining those two events (i.e., the management discussions and the conversations Floyd had with Pate then Vail) it is apparent that even though management had been discussing a possible downsizing since August or September, the only two members of management involved in those discussions that testified regarding those meetings, were sure during the week before October 28 that Waldo Floyd would not be laid off. The only testimony showed that even though downsizing had been discussed in almost every weekly management meeting since August or September, management felt that Floyd would not be laid off. Instead, Respondent told Floyd that he would be transferred to another job at Mr. Carroll's dirt pit.

When taken together, the management meetings and Floyd's conversations the week before his layoff show that nothing occurred up until the week before Floyd's layoff, that contributed to his termination. Therefore, I shall examine the record to find what, if anything, caused management to change from a belief that Floyd would not be laid off during the week before his layoff, to a decision to terminate Floyd.

The record showed that one thing of significance did occur during that one-week period immediately before the termination of Floyd. That was Respondent's receipt of the Union's demand for recognition. Respondent received that demand at 2:16 p.m. on October 28. It immediately interrogated all its employees on all its jobs about the Union and then, around 5:00 p.m., it terminated Waldo Floyd. There was no evidence of any other event during the last several days before Floyd's termination, which allegedly caused Respondent to change its mind regarding its continued employment of Waldo Floyd.

[15] Myers allegedly agreed to a date for his layoff but quit before that date in order to accept another job.

Respondent's records show that it employed 17 people in the grading, milling and asphalt plant on the Georgia Ports Authority – Container Berth 1 Project (R Exh. 1).[16]

As to the 17 positions, five of those employees were fired for cause. Those were Nicholas Evans, Jason Barnwell, William Crask, Michael Tilley and John Wilson (R Exh. 1). Evans and Barnwell were fired on January 29, 2003[17] because they were consistently late for work. William Crask was fired on 10/16/02 for insubordination. Michael Tilley was fired on 8/20/02 for failing a drug test. John Wilson was fired on 6/13/02 because he discussed "employee wage rates among co-workers." Tilley and Crask were terminated after Respondent allegedly started its layoff discussions in August. Even though neither was laid off, their terminations created jobs that were never filled on the Phase 1 job.[18]

Since Respondent had fired Wilson, Tilley and Crask for cause, it was left with 14 employees including foreman, laborer, laborer/operator, operator and operator/foreman, on October 28, 2002. After Floyd was laid off on that day, no other employee was terminated by layoff or otherwise, until November 8[19] when Robert Singleton was laid off for lack of work. Collen Doyle was laid off for lack of work on December 13. No one else was terminated after October 28 and before January 1, 2003.

Respondent's records (GC Exh. 17, Replaced), show as follows regarding the number of regular time and overtime hours worked on the Project 1 job (CB1 SITE WORK-GPA) after September 30, 2002:

9/30-10/06/02	396.00 hours	232.50 overtime	628.50 total
10/7-10/13/02	912.50	281.50	1,194.00
10/14-10/20/02	421.50	114.00	535.50
10/21-10/27/02	302.00	128.50	430.50
10/28-11/03/02	288.00	122.00	410.00
11/04-11/10/02	318.00	94.50	412.50
11/11-11/17/02	774.00	99.50	873.50
11/18-11/24/02	1,043.00	440.50	1,483.50
11/25-12/02/02	737.50	61.50	799.00
12/03-	643.00	44.50	687.50

[16] Respondent worked on phase 1 of that Port Authority job from April or May to December 2002.

[17] As shown above, Respondent offered evidence that the Phase 1 job was completed in December 2002. If so, Evans and Barnwell were fired after that job was completed.

[18] There was no showing that the discharges of Tilley and Crask were even considered in dealing with the possible reduction in force. Those discharges should have relieved to some extent the pressure to layoff other employees.

[19] That occurred after Respondent received the Union's unfair labor charge on November 5.

12/09/02

The above shows that after Floyd's layoff, Respondent had work that required 4666 total hours of work before December 9, 2002 of which 862.5 hours would be overtime work.

In consideration of the above figures by themselves, I am unable to find evidence that supported Respondent's October 28 reduction in force. Moreover, it is important to keep in mind that both Kenneth Pate and Joseph Vail assured Floyd that he would not be laid off during the week before his termination. Therefore, if the above records show anything, they must show something occurred between the time Pate and Vail told Floyd he would not be laid off and October 28. With that in mind, I shall question what if anything is shown in Respondent's records regarding the one-week periods before the layoffs of Floyd, Singleton and Doyle.

During the workweek before Floyd's layoff the Phase 1 crew worked 430.50 total hours. During the workweek before Singleton's layoff the crew worked 412.50 total hours. During the workweek before Doyle's layoff the crew worked 687.50 total hours.

The above figures also show the slowest one-week period occurred when there was no layoff. The slowest week was during the 10/28-11/03 week when the total number of hours was 410.00. The amount of work performed during the week before Floyd's termination and after Pate and Vail stated that he would not be laid off, does not justify a change in thinking to any greater extent than what occurred during several other workweeks.

Therefore, I find there was no convincing proof that anything other than protected activity occurred that would cause Respondent to decide to initiate a layoff one week after it expressed its belief that Waldo Floyd would not be laid off. Its records failed to show why Respondent decided to commence a layoff by terminating anyone on October 28.

Floyd was Selected as First Cut Due to Attitude and Careless Operation of Equipment Around Structures:[20]

As to this issue, Respondent's biggest hurdle is explaining why Floyd was selected as the first employee to be laid off for lack of work, when he had been assured by both Pate and Vail during the prior week that he would not be laid off.

The record showed that Floyd was never disciplined before October 28. In fact Floyd was complemented about his work. Even though Project Manager Vail remarked that Floyd was slow in operating the motor grader when Floyd was tested before he was hired in July, both Joseph Vail and Steve Motes complemented Floyd's work. Vail said that Floyd was his most dependable employee and Motes told Floyd that he had a good eye for grade.

There was no evidence showing that anything other than its knowledge of the Union's recognition demand, occurred during the week before Floyd's discharge to change the circumstances that existed when Floyd talked with Pate and Vail.

I find that the evidence failed to show that Respondent would have selected Floyd for termination in the absence of his Union organizing activities.

Respondent's failure to show there was no other work for Floyd:

In addition to the above, there remains a question as to whether Floyd would have been transferred to another job upon completion of project 1. As shown above, during the week before his termination, both Kenneth Pate and Joseph Vail told Floyd that he would continue to work after project 1. In that regard, there was no credible evidence in the record which proved that work was no longer available on any of Respondent's jobs and especially those at Mr. Carroll's dirt pit, on and after October 28.

In view of the full record I find that Respondent terminated Floyd because of its Union animus and the evidence failed to prove that Floyd would have not been terminated in the absence of his Union organizing activities.

CONCLUSIONS OF LAW

1. By threatening to discharge its employees, by threatening its employees with plant closure, because of their Union activities; and by unlawfully interrogating its employees about the Union; Respondent, Carroll & Carroll, Inc. has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By discharging and failing to reinstate employee Waldo Floyd because of his Union activities, the Respondent, Carroll & Carroll, Inc. has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act

REMEDY

Respondent having engaged in unfair labor practices, I order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent having unlawfully discharged and failed to reemploy Waldo Floyd, is hereby ordered to immediately reinstate Floyd to his former job, or if that job no longer exists, to a substantially equivalent job, and to make Floyd whole for all loss of pay and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:[21]

[20] I found above that Respondent failed to show it would have laid off any employee on October 28 in the absence of Floyd's Union activities. Therefore, Respondent failed to justify Floyd's layoff regardless of the alleged reasons why he was selected ahead of all other employees for the October 28 layoff. However, out of caution, I shall assume, for the sake of this discussion, that Respondent did show it would have laid off one or more employees in the absence of its employees' Union activities. In that regard, I have considered whether the evidence proved that Floyd would have been the first selected for layoff, in the absence of his Union organizing activities.

[21] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Carroll & Carroll, Inc., its officers, agents, and representatives, shall

1. Cease and desist from

(a) Threatening its employees with discharge because of its employees' activities on behalf of International Union of Operating Engineers, AFL–CIO Local 474, or any other labor organization.

(b) Threatening its employees with plant closure because of its employees' activities on behalf of a labor organization.

(c) Unlawfully interrogating its employees about their activities on behalf of a labor organization.

(e) Discharging and refusing to reemploy its employees because of its employees' activities on behalf of a labor organization.

(f) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order offer immediate reinstatement to Waldo Floyd to his former job, or, if that job no longer exists, to a substantially equivalent job and make Floyd whole for all lost pay and other benefits suffered since his October 28 discharge.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Waldo Floyd and within 3 days thereafter notify Floyd in writing that this has been done and that the discharge will not be used against him in any way.

(c) Within 14 days after service by the Region, post at its facility or office in Savannah, Georgia copies of the attached notice marked "Appendix."[22] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 2001.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. July 15, 2003

[22] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board had found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT threaten to discharge our employees because of their activities on behalf of International Union of Operating Engineers, AFL–CIO Local 474 or any other labor organization.

WE WILL NOT threaten our employees with plant closure because of their protected and union activities.

WE WILL NOT unlawfully interrogate our employees because of their protected and union activities.

WE WILL NOT discharge or fail to properly reinstate any of our employees because you engage in organizing activity on behalf of International Union of Operating Engineers, AFL-CIO Local 474 or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Waldo Floyd immediate reinstatement to his former job, or, if that job no longer exists, to a substantially equivalent job.

WE WILL make Waldo Floyd whole for all loss wages and other benefits incurred by him since October 28, 2002.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Waldo Floyd and WE WILL, within 3 days thereafter, notify Floyd in writing that this has been done and that his discharge will not be used against him in any way.

CARROLL & CARROLL, INC.